

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**D. R. SHERRY CONSTRUCTION, LTD.,**

**Respondent,**

**vs.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**Appellant.**

---

DOCKET NUMBER WD69631

DATE: August 4, 2009

---

Platte County Circuit Court  
The Honorable Owens L. Hull, Jr., Judge

---

Appellate Judges:

Division Two: Victor C. Howard, P.J., Joseph M. Ellis and Mark D. Pfeiffer, JJ.

---

Attorneys:

Jason A. Davey  
Kansas City, MO

Attorney for Respondent,

Michael A. Gross  
St. Louis, MO

Co-Counsel for Respondent,

John E. Franke and Keith A. Cary  
Kansas City, MO

Attorney for Appellant.

---

**MISSOURI APPELLATE COURT OPINION SUMMARY  
MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**D. R. SHERRY CONSTRUCTION, LTD.,**

**Respondent,**

**v.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**Appellant.**

WD69631

Platte County, Missouri

Before Division Two Judges: Victor C. Howard, P.J., Joseph M. Ellis and Mark D. Pfeiffer, JJ.

American Family Mutual Insurance Company (American Family) appeals the trial court's judgment for D. R. Sherry Construction LTD (Sherry) on Sherry's breach of contract claim and vexatious refusal to pay claim. On appeal, American Family presents five points. Because we find its second point dispositive, we address that point alone and reverse the trial court's judgment for Sherry. In the dispositive point on appeal, American Family claims that the trial court erred in overruling its motion for directed verdict at the close of all the evidence, because Sherry failed to present evidence to support each element of its breach of contract claim. Specifically, American Family claims that Sherry failed to present evidence that the property damage occurred during the policy period.

**REVERSED AND REMANDED.**

**Division Two holds:**

To carry its burden at trial, Sherry was obligated to present evidence that the property damage occurred between December 5, 2002, and December 5, 2003. The evidence at trial establishes that the property damage to the house occurred sometime between August 15, 2003, and April 2004. Sherry, however, never presented any evidence that the completed home's exposure to the unanticipated soil conditions actually caused physical property damage to the home *before* December 5, 2003. The jury, therefore, had no evidence from which it could conclude that the damage occurred *before* December 5, 2003. Instead, the jury could only theorize that the property damage occurred before December 5, 2003, and not between December 6, 2003, and April 2004. That is the definition of speculation. Sherry, therefore, failed to carry its burden to present evidence that its insurance contract with American Family covered the house's property damage.

**Opinion by: Mark D. Pfeiffer, Judge**

Date: August 4, 2009

\*\*\*\*\*

|  |
|--|
| This summary is <i>UNOFFICIAL</i> and should not be quoted or cited. |
|--|